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IN THE

Supreme Court of the United States

October Term, 1969

No. 852

HYMAN STERNMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 24, 1969.

Opinions Below

The unreported opinion of the United States District Court for the Northern District of Ohio, Western Division (A. 53),* the opinion of the United States Court of Appeals

* Citations containing the prefix "A" refer to page numbers of the Appendix filed by petitioner in the United States Court of Appeals for the Sixth Circuit, which has been filed as part of the certified record in this Court.

for the Sixth Circuit (not yet officially reported) and the unreported opinion of the latter court on rehearing are in Appendix B hereto, *infra*, pp. 6a-18a.

Jurisdiction

The judgment of the Court of Appeals was entered on June 24, 1969. A timely petition for rehearing was denied on October 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether an indictment alleges all "essential facts constituting the offense charged," as required by Rule 7(c), F. R. Crim. P., when, charging the crime of contempt of court under 18 U.S.C. §401 for refusal to obey an order to answer questions before a grand jury, it fails to allege (a) that the accused had been granted immunity under an applicable statute, (b) the subject of the grand jury investigation, and (c) the questions the accused declined to answer.

2. Whether an equivocal plea of guilty, whereby the defendant, appearing without counsel, expressly denies his guilt of the essence of the crime charged, can be validated by inconclusive statements made by the defendant days before and days after the entry of the plea.

3. Whether a defendant's conclusory statement that he does not wish counsel and that he understands the charge against him effects a knowing and intelligent waiver of

counsel, when the defendant's questions and statements during the entire proceedings demonstrate his lack of understanding of the charge and possible defenses thereto.

4. Whether a defendant is guilty of contempt when, having been granted immunity from prosecution in the United States, he agrees to answer all questions except those relating to the period he resided in Canada, which he refuses to answer on the ground that those answers might tend to incriminate him under the laws of Canada, where he is not immune from prosecution.*

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States, Section 401 of Title 18 of the United States Code, and Rules 7, 32 and 34 of the Federal Rules of Criminal Procedure, which are involved, are set out verbatim in Appendix A, *infra,* pp. 1a-5a.

Statement

On February 14, 1968, petitioner Hyman Sternman, an individual with little education (A. 11), while a United States prisoner, was brought to testify before a grand jury in the Northern District of Ohio, Western Division (A. 5). Just six months earlier he had appeared before a grand jury in the same district and had been excused after exer-

* If certiorari is granted, petitioner also intends, with the Court's permission, to raise the issue of the trial court's failure to comply with Rule 11, F. R. Crim. P., in accepting petitioner's plea of guilty. For explanation of this issue, see A. 50-51 and Point II(C) of Appellant's Brief below.

cising his right to decline to answer questions on the ground of self-incrimination (A. 16). This time, he stated that he would answer any questions relevant to the period of time he lived in the United States, but declined, on the ground of self-incrimination, to answer any questions on the years he lived in Canada (A. 6).

Petitioner, without counsel, was then brought before the Court, where Government counsel stated that, pursuant to 47 U.S.C. § 409(1), petitioner had been granted immunity (A. 5). The Court advised petitioner that "[a] man can't be compelled to give testimony which tends to incriminate him, but if the testimony is not going to incriminate him because he is granted immunity when he gives it, then he cannot refuse to give it; and if he does refuse to answer questions, then it lays him open to charges of contempt of Court, which carry very severe penalties" (A. 6-7). Petitioner responded that he understood, but that he also understood "that anything pertaining to * * * anything I did in Canada, I feel * * * I don't have to talk about in the American court" (A. 7) — obviously trying, as best he could, to articulate a defense that the immunity granted could not safeguard him from prosecution in Canada. Without responding to petitioner's point, the Court ordered him "unequivocally to return to the grand jury room and to answer any questions" put to him (A. 11).

Since petitioner was without counsel, the Court asked whether he desired to be represented by counsel. He replied that he did not since "I don't believe I have any rights at all" (A. 5). He expressly told the Court that he did not "know how to explain" his position but "wish[ed]" he "knew how."

On February 19, 1968, petitioner returned to court to plead to an indictment charging him with a violation of 18 U.S.C. §401 for having disobeyed a "lawful order to answer the questions to be asked in the conduct of the Grand Jury proceeding" (A. 13-14). The indictment did not allege any grant of immunity, the statute authorizing the immunity, the subject matter of the grand jury investigation, or any of the questions petitioner refused to answer.

When asked by the Court whether he desired an attorney, petitioner replied that he did not, but instead "would like to discuss the matter" with the Court (A. 15). The questions petitioner posed to the Court indicate his total lack of understanding of the proceedings. For example, petitioner again asked whether he had "any rights at all." In an endeavor to understand the nature of a contempt proceeding, he sought an explanation of the difference between his prior appearance before the grand jury—when he also declined to answer questions but was *not* indicted for contempt—and this appearance—when he declined to answer questions and was indicted for contempt. Instead of explaining the crucial difference—*i.e.*, that the Government now claimed to have granted him immunity—the Court merely replied "that I cannot answer. I have no idea why that was" (A. 16). Petitioner asked whether he could obtain a copy of the grand jury minutes covering his appearance before it. After commenting that this was "a rather complicated legal problem," the Court advised defendant that "[y]our plea in this case has nothing to do with that." Petitioner's quest for understanding was cut short when the Court responded that it "cannot advise

people about the specific legal problems'' but ''can talk only in generalities'' (A. 19). After again refusing the aid of counsel, shortly after twice reiterating his belief that he had no rights (A. 19, 21), petitioner agreed to enter his plea, which reads as follows:

> ''I plead guilty but not for not answering questions to the Grand Jury as you have ordered me to'' (A. 22).

The Court then asked him whether he understood the charge contained in the indictment, and accepted petitioner's conclusory reply ''I think so, your Honor'' (A. 22), without any inquiry to elicit his verbalization of that understanding. Then, after advising petitioner that the plea of guilty permitted the Court to impose any amount of fine or imprisonment, and eliciting petitioner's conclusory concurrence that he was entering his plea of his own free will and accord, without threats or promises, the Court accepted the plea (A. 23). No further questions were asked of petitioner to elicit petitioner's understanding of the significance of the proceedings, the nature of the charge against him, the extent of his rights or the factual basis for his plea.

On February 21, 1968, petitioner was brought before the Court for sentencing. He was asked if he desired to change his plea and he responded that he knew he had pleaded guilty and would ''stand on it'' (A. 30). He was then sentenced to a term of imprisonment of three years (A. 30).

Following imposition of sentence, petitioner retained counsel, from whom petitioner, for the first time, learned of the existence of legal defenses which, unknown to him at the time he entered his plea, he could have interposed, including: (a) the insufficiency of the indictment; (b) the

inefficacy of the grant of immunity to immunize him from prosecution for crimes committed during his permanent residency in Canada; and (c) the misuse of the grand jury (A. 37, 46-47).

Counsel thereafter moved on his behalf pursuant to Rules 32(d) and 34, Federal Rules of Criminal Procedure to withdraw his plea of guilty and to arrest the judgment herein (A. 33-34). In its opinion of July 11, 1968, the District Court concluded that the indictment was "sufficient" and indicated that, although petitioner's legal arguments regarding the validity of his plea and waiver of counsel were "powerfully persuasive," the Court's subjective impression that petitioner was "contemptuous" and determined not to comply with its orders would be controlling. Without discussing any of petitioner's cited authorities, the District Court denied the motion.

On June 24, 1969, the Court of Appeals for the Sixth Circuit affirmed. It held, *inter alia,* (a) that this Court's decision in *Russell* v. *United States,* 369 U.S. 749 (1962) was inapplicable to the instant indictment which, despite the omissions noted *supra* p. 5, was sufficient under Rule 7(c); (b) that petitioner's equivocal guilty plea, if considered alone, would have been invalid under *Hulsey* v. *United States,* 369 F.2d 284 (5th Cir. 1956), but that the defect was cured by statements he made five days before the plea, and by his affirmance two days thereafter that he had, in fact, pleaded guilty; and (c) that petitioner's repeated rejection of the Court's offers of counsel during his three appearances was alone sufficient to permit the inference that he had knowingly and intelligently waived his

right to counsel in accordance with *Von Moltke* v. *Gillies,* 332 U.S. 708 (1948). While denying, on October 17, 1969, petitioner's timely motion for rehearing, the Court amended its prior opinion to hold invalid petitioner's contention that the proffer of immunity was insufficient to protect petitioner from prosecution for crimes committed while he was a Canadian resident, a defense ignored in the Court's initial opinion.

Reasons for Granting Writ

As hereinafter shown, several bases for granting certiorari are found in the various issues raised by this petition: conflict among the circuits; conflict with applicable decisions of this Court; and important questions not yet determined by this Court.

1. The decision below is in conflict with this Court's opinion in *Russell* v. *United States,* 369 U.S. 749 (1962), and with a decision by the Court of Appeals for the Third Circuit.

In *Russell,* this Court held that, to comply with the mandate of Rule 7(c), F.R. Crim P., that all "essential facts" be alleged, an indictment, for contempt of Congress by refusal to answer questions, must set forth the subject under investigation (*id.* at 753), and the questions which the defendant refused to answer (*id.* at 764). The contempt statute involved in *Russell* (2 U.S.C. § 192) required that the questions asked be "pertinent to the question then under inquiry" and the indictment there

contained only a conclusory allegation to that effect. In voiding the indictment, this Court held:

> "Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." *Id.* at 764.

The indictment in the instant case likewise simply repeats the language of the criminal statute, 18 U.S.C. § 401, which requires that the order to answer questions must be a "lawful" one. But, as in *Russell,* because the guilt of the accused "depends so crucially upon" the lawfulness of the order to answer questions, "the indictment must do more than simply repeat the language of the criminal statute." It must, as petitioner contends, allege facts establishing that the order to answer incriminatory questions was "lawful"—*i.e.,* a valid grant of immunity under a specified statute [*Murphy* v. *Waterfront Comm'n,* 378 U.S. 52 (1964); *Stevens* v. *Marks,* 383 U.S. 234, 244-46 (1966)], the subject under investigation by the grand jury, and the questions the accused refused to answer. *Marcus* v. *United States,* 310 F.2d 143, 146 (3d Cir. 1962), *cert. denied,* 372 U.S. 944 (1963).

The Court below construed *Russell* as limited to contempts of Congress, and, therefore, inapplicable to the instant case, involving contempt of court. As the foregoing cases show, the rule of *Russell* is much broader, and it invalidates the indictment here. Since the Court below thus "misconceived the meaning of" the *Russell* decision in reaching a decision contrary to *Russell's* holding and import, it should be reviewed by this Court. *Wilkinson* v.

United States, 365 U.S. 399, 401 (1961); *cf. Wilson* v. *Schnettler,* 365 U.S. 381, 383 (1961).

If, however, the Court below correctly construed *Russell* as limited to contempts of Congress, the issue raised here —the sufficiency of an indictment charging contempt of court for refusing to answer questions before the grand jury—is one upon which this Court has never passed. In addition, the decision below is in conflict with decisions in other circuits which have indicated that an indictment (or a notice under Rule 42(b), F.R.Crim.P., which serves the same function as an indictment in contempt cases), charging contempt for refusal to answer questions before a grand jury, must set forth the questions the accused refused to answer. *Marcus* v. *United States, supra,* 310 F.2d at 146; *United States* v. *Pagano,* 171 F.Supp. 435 (S.D.N.Y. 1959). In view of the increasing usage of criminal contempt proceedings for conduct before grand juries [*e.g.,* New York Times, April 13, 1969, p. 70, col. 3; *id.,* June 26, 1969, p. 1, col. 2], the question of what allegations such an indictment must contain is an important question which should be decided by this Court, in accordance with the basic principles enunciated in *Russell.*

2. Petitioner, when asked to plead, stated "I plead guilty, but not for not answering questions to the Grand Jury as you have ordered me to." In sustaining the acceptance of this statement as a plea of guilty, the decision below is in direct conflict with the decisions of the Courts of Appeals for the Fifth Circuit in *Hulsey* v. *United States,* 369 F.2d 284 (5th Cir. 1956), the Third Circuit in *United States ex rel. Crosby* v. *Brierley,* 404 F.2d 790, 801 (3d Cir. 1968), and the Eighth Circuit in *Bergen* v. *United States,*

145 F.2d 181, 188 (8th Cir. 1944). The rule enunciated in these cases is that under due process

> "a fundamental requisite of a plea of guilty is that it manifest an unequivocal and knowledgeable admission of the offense charged and should not be accepted if so limited or conditioned that it constitutes * * * little more than an ambiguous expression of qualified guilt coupled with a protestation of innocence." *Hulsey* v. *United States, supra,* 369 F.2d at 287; and quoted with approval in *United States ex rel. Crosby* v. *Brierley, supra,* 404 F.2d at 799 and 801.

Petitioner's plea here was precisely what was held to be unacceptable in the foregoing cases. The Court below so conceded, stating that if faced only with the words of the plea, "reversal on the strength of *Hulsey* would seem to be required" (see Appendix B, *infra,* p. 14a). Yet the Court below held the defects to have been cured by unconnected statements, made by petitioner several days before and several days after the entry of the plea, which statements were also not unequivocal admissions of the offense charged (A. 8, 11, 26, 30).*

* The Court below relied primarily on petitioner's affirmation, at the time of sentencing, that he had "pleaded guilty to not obeying [the Court's] order." But, to paraphrase a recent opinion of this Court "it is certainly conceivable that he may have intended to acknowledge only that he in fact * * * [disobeyed the court's order to answer questions] without necessarily admitting that he committed the crime charged" of disobeying a *lawful* order. *McCarthy* v. *United States,* 394 U.S. 459, 471 (1969).

The Court below expressly found that petitioner's statements indicated his belief, during the District Court proceedings, that "he could not legally be required to answer questions concerning his activities in Canada" (see Appendix B, *infra,* p. 15a). Such belief would be inconsistent with a plea of guilty to the indictment charging disobedience of a *lawful* order, and consistent with his denial that he was pleading guilty for not answering questions as ordered concerning the period he resided in Canada.

Accepting *arguendo* that the record as a whole could possibly support a finding that petitioner fully understood the nature of the charge against him, the holding below is nevertheless contrary to the decision in *Hulsey,* which specifically held that an equivocal plea is invalid "even assuming, as the record as a whole indicates, that appellant may have been sufficiently aware of the elements of the charges against him and the maximum limits of punishment." 369 F.2d at 287.

The rule of *Hulsey, Brierley* and *Bergen* is thus very strict; nothing in those cases permits an equivocal and ambiguous plea to be "cured" by reference to colloquies between the court and defendant at times totally removed from the taking of the plea.

Moreover, the record, as a whole, refutes any conclusion that the equivocation in the plea was corrected. For example, the Court below ignored other portions of the record wherein petitioner attempted to articulate a substantive defense based on the failure of the grant of immunity to shield him from prosecution in Canada. A similar layman's attempt by a defendant to articulate a defense was considered in both *Bergen* and *Brierley, supra,* to constitute "as much a part of his plea as was the word 'guilty' " thus rendering the plea invalid. *Bergen* v. *United States, supra,* 145 F.2d at 188; *United States ex rel. Crosby* v. *Brierley, supra,* 404 F.2d at 801. The conflict between the decision below and those in *Hulsey, Brierley* and *Bergen, supra,* is thus very clear.

This Court has never spoken on the application of due process requirements to the acceptability of an equivocal

plea of guilty. The question has arisen in Courts of Appeals on several occasions (producing, as demonstrated, a conflict of opinion) and in the highest courts of several states. *E.g., State* v. *Olsen,* 270 Minn. 329, 133 N.W. 2d 489 (1965); *People* v. *Morrison,* 348 Mich. 88, 81 N.W. 2d 667 (1957); *State* v. *Stacy,* 43 Wash. 2d 358, 261 P.2d 400 (1953). It is obviously a problem of continuing importance to the administration of criminal justice in the federal courts, for as this Court has recently noted in *McCarthy* v. *United States,* 394 U.S. 459, 463 n.7 (1969), more than 80 per cent of all convictions in the federal courts are obtained on guilty pleas. This Court should resolve the important conflict here presented.

3. Petitioner was permitted to enter his plea without the assistance of counsel. The decision of the Court below, in finding that petitioner had effectively waived his right to counsel, is in conflict with the decisions of this Court and the Court of Appeals for the Third Circuit.

The Court below held that a finding that petitioner had knowingly and intelligently waived his right to counsel could be "reasonably inferred" solely from the frequency of petitioner's rejection of the Court's suggestion that he consult counsel.* In deeming conclusive the number of times petitioner repeated his rejection of counsel, the Court below implicitly held that a defendant's waiver of counsel,

* The only other factor mentioned by the Court below to uphold the waiver of counsel, was that petitioner had talked with an attorney the day *before* he was brought to the grand jury (A. 6). But at that time, petitioner still did not know why he had been brought to Ohio (A. 6). Since the record is otherwise silent as to this conversation with an attorney, it would be sheer speculation to rely on it in finding a valid waiver of counsel.

invalid due to lack of knowledge, becomes valid and knowingly entered by mere repetition. The Court below thus ignored the established minimum standards for an effective waiver of counsel enunciated in *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948), and *Meadows* v. *Maxwell*, 371 F.2d 664 (6th Cir. 1967), although it cited those cases in upholding the sufficiency of the waiver.

The opinion in *Von Moltke, supra*, 332 U.S. at 723-24 described as "serious and weighty" the trial judge's responsibility of deciding whether to accept a defendant's waiver of counsel, and stated:

> "A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered"

and

> "The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, * * * possible defenses to the charges, * * * and all other facts essential to a broad understanding of the whole matter."

The District Court here failed to make the "penetrating and comprehensive examination of all the circumstances" required by *Von Moltke* in order to validate a waiver of counsel. The District Court did not "investigate as long and as thoroughly as the circumstances" demanded, but was content instead to ask five routine questions which

elicited only conclusory answers from petitioner, including his statement that he *thought* he understood the charge (A. 22). In affirming, the Court of Appeals necessarily held that a waiver of the right to counsel can be validated by such brief questioning, eliciting only conclusory answers, without any effective probing of petitioner's actual knowledge, and despite his utter confusion and bewilderment revealed by the rest of the record.

Such conclusory answers to routine questions were specifically held to be an insufficient basis for finding an intelligent waiver of counsel in *United States ex rel. McDonald* v. *Commonwealth*, 343 F.2d 447, 451 (3d Cir. 1965). Here, as in *McDonald*, the record conclusively demonstrates that petitioner was unaware of and did not understand his rights or the nature of the charge against him. For example, petitioner constantly reiterated his belief that he had no rights at all. Furthermore, as noted pp. 4-5, *supra*, his questions conclusively demonstrated his lack of comprehension of the concept of immunity, crucial to an understanding of the charge against him. Finally, there was no discussion whatsoever, as required by *Von Moltke*, of petitioner's knowledge of possible defenses (A. 15-24; and see paragraph 4, *infra*). This conflict, between the Court below and the decisions in *Von Moltke* and *McDonald* requires resolution by this Court.

4. As noted *supra* p. 4, petitioner agreed to answer all questions except those relating to the period he resided in Canada, where the grant of immunity in United States Courts would not protect him from prosecution. The District Court ignored petitioner's repeated requests for guid-

ance on this matter and instead directed him to answer all questions posed to him.

Petitioner's post-sentence motion pursuant to Rule 32 (d), F.R. Crim. P., was based, in part, on the argument that, when petitioner waived his right to counsel and entered his equivocal plea of guilty, he did not have a full understanding of possible defenses to the indictment. Petitioner urged below, *inter alia*, that he did not understand that he could have defended against the contempt charge on the ground that the grant of immunity could not immunize him from prosecution in Canada. The District Court ignored the merits of this defense. The Court of Appeals initially held that there was "no contention here that the proffer of immunity was not legally sufficient," but, following a petition for rehearing, changed its opinion to hold that:

> "There is no validity to the argument that the proffer of immunity was not legally sufficient" (Appendix B, *infra*, p. 18a).

The sufficiency of the proffer of immunity to compel petitioner to testify concerning the period he lived in Canada is crucial to petitioner's motion to withdraw his plea; if, contrary to the decision below, there is validity to the argument that the proffer of immunity was not legally sufficient to compel petitioner to testify concerning the period he lived in Canada, petitioner should have been permitted to withdraw his plea, there being no dispute that he did not understand the legal efficacy of such defense.

This Court has made clear that a witness has "a constitutional right to stand on the privilege against self-

incrimination until it has been fairly demonstrated to him that an immunity, *as broad in scope as the privilege it replaces,* is available and applicable to him." *Stevens* v. *Marks,* 383 U.S. 234, 246 (1966) (emphasis added). The question here is whether the scope of the privilege against self-incrimination encompasses statements which could incriminate the witness in a foreign jurisdiction, as to which the grant of immunity offers no protection from prosecution.

This Court has never ruled on this important question.* However, in rejecting petitioner's contention that the grant of immunity was legally insufficient to protect him from prosecution in Canada, the Court below is in conflict with the clear import of and express statements in this Court's opinion in *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964).

The specific issue in *Murphy* was the sufficiency of a state grant of immunity to compel testimony which might incriminate the witness under federal criminal laws. This Court there held that a witness could not be compelled to testify under a grant of immunity from state or federal prosecution if he was subject to prosecution under the other jurisdiction.

The two cases on which this Court relied most heavily in *Murphy,* and which it repeatedly cited with approval, were *East India Co.* v. *Campbell,* 1 Ves. sen. 246, 27 Eng.

* Another important issue not previously decided by this Court may be implicitly intertwined in this issue: whether one state can use a grant of immunity to compel testimony which incriminates the witness under the laws of another state.

Rep. 1010 (1749), and *United States of America* v. *McRae*, L.R., 3 Ch. App. 79 (1867). The square holding of these English decisions, which represent the "settled English Rule" (378 U.S. at 63),* was that "[t]he rule [against self-incrimination] did 'protect witnesses against disclosing offenses in violation of the laws of another country' " (378 U.S. at 72). The *Murphy* opinion firmly rejected the notion that the purpose of the privilege against self-incrimination was merely to protect against "the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling *that same Government* to convict a man out of his own mouth" and instead accepted "as correct the construction given the privilege by the English courts." 378 U.S. at 77 (emphasis added).

Although the precise issue in *Murphy* was the sufficiency of a state grant of immunity to compel testimony incriminatory under federal law, it is clear beyond doubt that this Court there subscribed to the view of the cited English cases that a witness cannot be compelled in one country to answer questions which would incriminate him under the laws of another country. The tenor of the *Murphy* opinion affords no grounds for distinguishing the two-country situation from the federal-state situation there presented. The "cruel trilemma of self-accusation, perjury or contempt" which the self-incrimination clause was designed to avoid (378 U.S. at 55), is as real whether the witness is faced with the prospect of prosecution at home or abroad.

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* This rule is also followed, as noted in *Murphy*, 378 U.S. at 77, by Canada, Australia and India. See Grant, *Federalism and Self-Incrimination: Common Law and British Empire Comparisons*, 5 U.C.L.A. L. Rev. 1 (1958).

This Court should now rule squarely upon the question here raised, which was not presented in *Murphy*, but was decided by the Court below in clear conflict with the applicable dictates of the *Murphy* opinion.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 14, 1969

APPENDIX A

Constitutional and Statutory Provisions

1. United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. §401

§401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

Appendix A

3. Rule 7, Federal Rules of Criminal Procedure

Rule 7. The Indictment and the Information

(a) *Use of Indictment or Information.* An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) *Waiver of Indictment.* An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the

statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) *Surplusage.* The court on motion of the defendant may strike surplusage from the indictment or information.

(e) *Amendment of Information.* The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) *Bill of Particulars.* The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires. As amended Feb. 28, 1966, eff. July 1, 1966.

4. Rule 32, Federal Rules of Criminal Procedure

Rule 32. Sentence and Judgment

(a) *Sentence.* Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) *Judgment.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) *Presentence Investigation*

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) *Probation.* After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

5. Rule 34, Federal Rules of Criminal Procedure

Rule 34. Arrest of Judgment

The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

APPENDIX B

Opinions Below

Opinion of the United States District Court for the Northern District of Ohio, Western Division, July 11, 1968

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

No. CR 68-17

UNITED STATES OF AMERICA,

vs.

HYMAN STERNMAN.

YOUNG, J.:

The defendant has filed a motion in two branches: the first, pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, to set aside the judgment of conviction herein and to withdraw the plea of guilty heretofore entered, in order to correct manifest injustice; the second, pursuant to Rule 34 of the Federal Rules of Criminal Procedure to arrest the judgment, since the indictment

does not state facts sufficient to constitute an offense against the United States. The Court concludes that the motion is not well taken as to either of its branches, and should be overruled.

Taking the two branches of the motion in reverse order, the defendant's arguments as to the sufficieny of the indictment are based on the contention that the indictment must include a vast amount of purely evidenciary allegations. Defendant apparently seeks a return to ancient practices, where indictments went on interminably. The present rules were designed to obviate the necessity for such prolixity. The indictment could leave no doubt in anyone's mind what the defendant was charged with doing, and would amply support any claim of double jeopardy if he were again charged with the same offense. Since these important tests are satisfied, the indictment is sufficient.

The first branch of the motion poses somewhat more problems. It is often hard to derive from a cold record an accurate picture of what the trier of the facts really saw and heard. An able advocate, picking the strongest portions of the record as a text for his arguments, can be powerfully persuasive.

So in this case, the defendant's picture of himself as a poor, humble, and ignorant individual, crushed and beaten by powerful forces that he could neither understand or cope with, is an appealing one.

He did not look or sound so appealing to the Court in his appearances before it. Telling the truth before a grand jury did not suit him, even though he was granted immunity from prosecution. No doubt he had good reason for his refusal. A number of such quickly occur to anyone

reasonably familiar with crime and criminal procedures. His attitude was the most completely contemptuous that there can be, the cold determination not to comply with the orders of the Court, regardless of any penalties the Court might impose.

The defendant gambled that these penalties might be little or nothing. Having lost, he wants to avoid them by a plea that it is unjust to hold him to the consequences of his decision. The Court is unsympathetic to such efforts. The defendant was not taken advantage of, overborne, or treated unjustly. His motion is overruled.

The District Attorney may draw and submit an entry accordingly.

DON J. YOUNG
United States District Judge

Toledo, Ohio.

Appendix B

Opinion of the United States Court of Appeals for the Sixth Circuit, June 24, 1969

No. 18966

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HYMAN STERNMAN,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Northern District of Ohio, Western Division

Decided June 24, 1969

Before: WEICK, Chief Judge; PHILLIPS and COMBS, Circuit Judges.

COMBS, Circuit Judge. The appellant, Hyman Sternman, was sentenced to three years imprisonment after pleading guilty to an indictment charging contempt of court. The district court denied his motion filed under Rule 32(d), Federal Rules of Criminal Procedure, to set aside the conviction and permit withdrawal of the plea of

guilty and a motion filed under Rule 34, Federal Rules of Criminal Procedure, to arrest the judgment.

The contempt charge arose when Sternman, already a federal prisoner, was subpoenaed to testify before a federal grand jury which was investigating interstate gambling activities. He agreed to answer any questions pertaining to his activities in the United States but would answer no questions about his activities during a period he had resided in Canada. Immunity was proffered under 47 U.S.C. § 409(1) and, when Sternman still refused to answer, he was taken before the presiding judge, the Honorable Don J. Young. Judge Young explained the functions of the grand jury and the concept of immunity. Since Sternman was not represented by counsel, he was told by the United States Attorney and by the judge that he should have a lawyer and that the proceedings would be continued until he could consult with one. Sternman stated that he did not desire a lawyer. He said, "I have told the grand jury I would not answer any questions on the years I lived in Canada, on the grounds that it might tend to incriminate me. But of every day I lived in the United States I will answer anything they want." Judge Young advised Sternman that a witness before a grand jury cannot withhold evidence on the ground that it might tend to incriminate him if he is granted immunity from his own self-incrimination, and that if he refused to answer questions he would subject himself to charges of contempt. Sternman made it clear that he would refuse to answer questions concerning his activities in Canada. The judge ordered him to return to the grand jury room and to answer any

questions put to him by Government attorneys. Upon returning to the grand jury room, he again refused to answer and the grand jury indicted him for contempt of court.

Five days later, Sternman was brought before Judge Young to plead to the indictment. The judge again commented upon the absence of counsel and offered to delay the case to enable him to obtain counsel. The judge also offered to appoint counsel although Sternman was not indigent. Sternman chose to proceed without counsel, saying at one point, "I feel as though I can explain it a lot better than an attorney."

Sternman directed several questions to the judge concerning his legal rights, the powers of the Justice Department, and why he had not been cited for contempt on a previous refusal to give grand jury testimony. He was then called upon to enter a plea to the indictment. He replied, "I plead guilty, but not for not answering questions to the Grand Jury as you have ordered me to." He was questioned further and indicated that he understood the charge and the possible consequences of a plea of guilty; he also stated that the plea was freely entered.

Two days later, Sternman was brought before Judge Young for sentencing. He was told then that he could withdraw his plea of guilty and receive a jury trial if he so desired. Sternman replied, "I pleaded guilty to not obeying your order. I still stand on it." The judge imposed sentence to commence at the end of the sentence Sternman is now serving.

On the Rule 34 motion it is argued that the indictment should have been dismissed for failure to allege the "essen-

tial facts constituting the offense charged" as required by Rule 7(c), Federal Rules of Criminal Procedure. On his motion to withdraw his plea of guilty, Sternman contends (1) he did not knowingly enter an unequivocal plea of guilty; (2) he did not make a valid waiver of counsel; and (3) the court failed to make the inquiries required under Rule 11, Federal Rules of Criminal Procedure, before accepting the plea of guilty.

Looking first to the Rule 34 motion, we think the indictment was sufficient.[1] Rule 7(c) requires only that "the indictment or information shall be plain, concise and contain a definite written statement of the essential facts constituting the offense charged." The charge must be in sufficient detail that the accused can plead former jeopardy in case he is later charged with a similar offense arising out of the same facts. *Cochran and Sayre* v. *United States*, 157 U.S. 286, 290 (1895). Also see *Russell* v. *United States*,

1. The body of the indictment read as follows:
"The Grand Jury charges:

COUNT I.

That on the 14th day of February, 1968 within the Northern District of Ohio,

HYMAN STERNMAN,

the defendant herein, having received a lawful order of a Court of the United States, in open court, to-wit: to return to the Grand Jury room, where the defendant,

HYMAN STERNMAN

was then a witness, in the Grand Jury proceeding, and the further lawful order to answer the questions to be asked in the conduct of the Grand Jury proceeding, did unlawfully, willfully, and knowingly disobey the said lawful order of the Court of the United States, in that he refused to answer the questions asked of him in the course of the Grand Jury proceeding, all in violation of Section 401 of Title 18 United States Code."

369 U.S. 749 (1962); *United States* v. *Debrow*, 346 U.S. 374 (1953).

Sternman, while admitting that the present indictment would be adequate to bar future prosecutions on the same offense, argues that the essential facts were not specifically stated. It is asserted that the charge that appellant had disobeyed a lawful order of the court was a mere conclusory statement and for that reason inadequate. It is contended that facts should have been alleged which, if proven, would have established the lawfulness of the order, that is, a valid proffer of immunity and the specific questions Sternman refused to answer.

Appellant relies upon *Russell* v. *United States*, supra, as support for his position. The indictments in *Russell* charged contempt of Congress under 2 U.S.C. §192. The charge in that case was refusal to answer questions "pertinent to the question then under inquiry" but the subject of the inquiry was not identified. The indictments were found to be defective by reason of this omission. We think *Russell* is inapplicable here. The Court in that case pointed out the difficulty in trying to ascertain "the question under inquiry." Indeed, there was some confusion as to the subject of the congressional investigation out of which the contempt charges originated. That problem is not present here.

It is not the grand jury's function to delve into the legal and factual basis for the court's order and make a finding that it was legal. It needs only to find that the accused violated an order of the court regular on its face, leaving the propriety of the order for the court, subject to appellate review. We hold that the indictment adequately apprised

Sternman of the charges against him and was otherwise legally sufficient. *United States* v. *Debrow,* supra; *Hupman* v. *United States,* 219 F.2d 243 (6th Cir. 1955), *cert. denied,* 349 U.S. 953 (1955); *Butzman* v. *United States,* 205 F.2d 343 (6th Cir. 1953), *cert. denied,* 346 U.S. 828 (1953).

Sternman's motion to be permitted to withdraw his plea of guilty, filed after imposition of sentence, was properly denied. Rule 32(d), Federal Rules of Criminal Procedure, provides:

> "A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Thus, Sternman's motion to withdraw his plea can succeed only if "manifest injustice" be shown. There was no such showing.

In advancing the argument that Sternman did not enter an unequivocal plea of guilty, reliance is placed on *Hulsey* v. *United States,* 369 F.2d 284 (5th Cir. 1956). It is true that, when called upon to enter his plea, appellant stated, "I plead guilty, but not for not answering questions to the Grand Jury as you have ordered me to." If faced only with this version of the plea, reversal on the strength of *Hulsey* would seem to be required. However, Sternman clarified his position in his extensive colloquies with Judge Young. When he was first brought before the judge, we find him making these statements:

> "I am not going to answer any questions, your Honor. I'm sorry. You can do anything you want.
>
> * * *

Appendix B

> "I refuse to answer any questions on ground that it might tend to incriminate me. You can order me for contempt."

Later, when he entered his plea, he said:

> "There's no chance of my answering, no chance whatsoever, because of the conditions thrown at me."

At his sentencing proceeding two days after entering his plea of guilty, this exchange took place:

> "The Court: * * * If you wish, I will permit you to withdraw your plea of guilty and enter a plea of not guilty and hold it over for jury trial.
>
> "Mr. Sternman: I pleaded guilty to not obeying your order. I will stand on it."

This statement removed any possible ambiguity and cured any defect which might have existed in the plea of guilty previously entered. It is apparent from the exchange between Judge Young and the appellant, both before the entry of his plea and before imposition of sentence, that Sternman fully understood the nature of the charge and the consequences of a plea of guilty. It is also perfectly clear from his remarks to the judge that he had made a deliberate choice to disobey the court's order and to take his chances on a contempt proceeding, apparently in the belief that he could not legally be required to answer questions concerning his activities in Canada. There is no contention here that the proffer of immunity was not legally sufficient.

No less than ten times Sternman was told of his right to counsel. He was offered a delay in the proceedings to enable him to consult with counsel and he was offered the services of appointed counsel. It is noted, too, that, when

he was first brought before Judge Young, Sternman stated he had talked with his counsel on the day before the hearing. It may be reasonably inferred, therefore, that appellant made a deliberate choice not to have counsel in the contempt proceedings. It is well settled, of course, that a defendant in a criminal case has a constitutional right to counsel unless he has made a valid waiver of the right. *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948); *Meadows* v. *Maxwell*, 371 F.2d 664 (6th Cir. 1967). But, a court may not compel a defendant to have the services of counsel. A defendant has a constitutional right to represent himself. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269 (1942). It is clear from this record that Sternman chose to exercise that right.

The remaining contention is that the court failed to comply with the requirements of Rule 11 before accepting Sternman's plea of guilty. Rule 11 requires the court to determine that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea; also that there is a factual basis for the plea. We have examined the proceedings here in light of the recent decision in *McCarthy* v. *United States*, —— U.S. ——, decided April 2, 1969, and are of the opinion that Judge Young complied with all the requirements of Rule 11 as construed in *McCarthy*. We note, too, that *McCarthy* does not have retroactive effect. *Halliday* v. *United States*, —— U.S. ——, 37 U.S.L.W. 3419. It seems to us that the judge leaned backwards not only in his efforts to convince appellant he should have counsel but also in fully explaining to him the nature of the charge and the consequences

of a guilty plea. Illustrative of Sternman's knowledge of the situation is his response to the judge's explanation that there was no statutory limit to the penalty which might be imposed for contempt of court. He replied, "Well, I have to take my chances."

Sternman was not a novice in his familiarity with court proceedings and pleas of guilty. The sentence which he was then serving was imposed after a plea of guilty. Moreover, it appears from the record that Sternman is an experienced, astute individual with confidence in his ability to take care of himself. We are convinced from a review of the entire record that his rights were fully protected and that there is no reversible error.

Judgment affirmed.

Appendix B

Opinion of the United States Court of Appeals for the Sixth Circuit on Petition for Rehearing, October 17, 1969

No. 18,966

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HYMAN STERNMAN,
Defendant-Appellant.

Before: PHILLIPS, Chief Judge, and WEICK and COMBS, Circuit Judges.

Appellant's petition for rehearing presents no issue not previously considered by the Court. However, the Court's opinion is amended to delete the last sentence of the first paragraph on page 6, which reads "[t]here is no contention here that the proffer of immunity was not legally sufficient," and substitute therefor the following language:

> "There is no validity to the argument that the proffer of immunity was not legally sufficient."

Upon consideration, the petition for rehearing is denied.

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No. 852

In the Supreme Court of the United States

OCTOBER TERM, 1969

HYMAN STERNMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1969

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HYMAN STERNMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B 9a-17a, 18a) is reported at 415 F. 2d 1165. The memorandum opinion of the district court (Pet. App. B 6a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1969. A petition for rehearing was denied on October 17, 1969. The petition for a writ

of certiorari was filed on November 14, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a grand jury witness who has been granted immunity from prosecution under 47 U.S.C. 409 may refuse to answer questions propounded to him on the ground that his answers may tend to incriminate him in a foreign jurisdiction.

2. Whether the other issues raised relating to the validity of the indictment and the voluntariness of the plea of guilty were properly resolved against petitioner by the court below.

STATEMENT

Petitioner entered a plea of guilty in the United States District Court for the Northern District of Ohio to an indictment under 18 U.S.C. 401, charging him with contempt of court for willful and knowing refusal to obey an order of the district court to answer questions before a federal grand jury investigating interstate gambling activities (A. 13-14; R. 1-2).[1] He was sentenced to three years' imprisonment, to commence upon the expiration of a federal sentence then being served (A. 30; R. 38).

The present proceeding was begun by a motion under Fed. R. Crim. P. 32(d) to set aside the plea of guilty on grounds of manifest injustice and by a mo-

[1] "A" designates the Appendix on file with this Court; "R" refers to the certified record also on file with the Clerk.

tion under Fed. R. Crim. P. 34 for arrest of judgment. In these motions and the accompanying affidavits (A. 33-34, 35-38, 39-52), petitioner and his counsel alleged, in essence, that petitioner had not in fact pleaded guilty to the indictment; that the indictment was fatally defective in that it did not set forth facts sufficient to establish an offense; that his waiver of counsel in these proceedings was not made intelligently and with a full understanding of his rights; and that since petitioner's refusal to answer questions before the grand jury related only to the period he had resided in Canada and since a federal grant of immunity could not bar a prosecution by Canada, petitioner was legally entitled to remain silent as to such questions, a right he had not at the time realized he had (A. 47-48).

The district court denied both motions (A. 53-55, 56; Pet. App. B 6a-8a). The court of appeals affirmed (R. 25; Pet. App. B 9a-17a). A petition for rehearing was thereafter filed asserting, *inter alia*, that the grant of immunity was legally insufficient because it did not immunize petitioner "from incriminating himself with regard to the period of time he lived in Canada * * *" (R. 27d). The court denied the petition with a brief order deleting the statement in its original opinion that there was no argument before it that the "proffer of immunity was not legally sufficient." It substituted for that finding the conclusion that "There is no validity to the argument that the proffer of immunity was not legally sufficient" (R. 28; App. B 18a).

The relevant facts relating to this issue are as follows: [2]

On February 14, 1968, petitioner appeared before a grand jury in the United States District Court for the Northern District of Ohio which was investigating the use of telephones in interstate commerce in connection with gambling activities. After being advised of his Fifth Amendment privilege to remain silent and of his right to have an attorney of his choice present outside the grand jury room (G 3-4),[3] petitioner invoked the privilege and refused to answer several questions relating to whether, in the period of 1960 to 1963, he made telephone calls from Canada and elsewhere to various named individuals with respect to wagering activities (G 4-6). He was advised by government counsel after these refusals that if he were to testify he would "be immune from prosecution for any matter, transaction or thing about which your testimony is compelled" under Section 409(l) of the Federal Communications Act, 66 Stat. 722, 47 U.S.C. 409(*l*) (G 6).[4] Petitioner per-

---

[2] The facts relating to the claim that the indictment was insufficient, that petitioner's plea of guilty was involuntary and that his waiver of counsel was not intelligently made are fully set forth in the opinions below (Pet. App. B 6a-17a).

[3] "G" designates the transcript of petitioner's three appearances before the grand jury. We are filing a copy of this transcript herewith.

[4] This section provides:

> No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Com-

sisted in his refusal to respond, and was brought before the district court (A. 4).

Government counsel advised the court of what had transpired in the grand jury room and requested that, in light of the grant of immunity, petitioner should be directed to answer all questions asked of him (A. 4-5). Petitioner advised the court that he had told the grand jury he "would not answer any questions of the years [he] lived in Canada, on grounds it might tend to incriminate me, but on every day I lived in the United States I will answer anything they want" (A. 6). The district judge responded (A. 6-7):

> Under our law, * * *, if a man is compelled to testify before a grand jury, then he cannot be prosecuted for anything arising out of the matter concerning which he has testified.
>
> In other words, he is granted immunity. Constitutional protection is thus accorded to him.

---

mission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

> In other words, a man can't be compelled to give testimony which tends to incriminate him; but if the testimony is not going to incriminate him, because he is granted immunity when he gives it, then he cannot refuse to give it.
>
> If he does refuse, it lays him open to charges of contempt of court which can carry very severe penalties.

After further colloquy in which petitioner reiterated his claim that he felt he did not have to testify "in the American court" about anything he "did in Canada" (A. 7), the court again explained that petitioner could not "stand on the Fifth Amendment with respect to these matters because [he was] being granted immunity—in other words, the Fifth Amendment does not give a man a right not to talk when he is being protected from incriminating himself. If he can be safeguarded from incrimination, which the statute provides, then he can't invoke his Fifth Amendment rights" (A. 8). After further discussion the court once again advised petitioner that if a witness "has information which they [the grand jury] seek, then he cannot withhold it on the ground that it might tend to incriminate him if he is granted immunity from his own self-incrimination" (A. 10). The court thereupon "unequivocally" directed petitioner "to return to the grand jury room and to answer any questions put to [him] by the government attorneys" (A. 11, 12).

Petitioner was returned to the grand jury room. Before any questioning commenced, government counsel offered to permit him to consult with an attorney of his choice or have the court appoint an attorney

for him. Petitioner responded that he could "afford an attorney and I don't want anybody" (G 8). He was then again advised that if he did testify he could not "be punished in any way on anything about which [his] testimony is compelled" (G 13). He nonetheless continued in his refusal to respond (G 11-12, 15).

The following morning he was again brought before the grand jury and again advised that if he heeded the order of the court he could not be prosecuted. He still persisted in his refusal to answer the questions directed at him (G. 16-19). The indictment was thereafter returned and the plea of guilty was offered and accepted (A. 15-28, A. 29-31). At the time of the taking of the plea, it was again explained to petitioner "that if he answers the questions put to him he would be immune to anything he answered, anything that arises from what he has answered" (A. 27, A. 28).

ARGUMENT

1. Petitioner argues that the grant of immunity offered to him was legally insufficient under *Murphy* v. *Waterfront Commission*, 378 U.S. 52, in that it "could not immunize him from prosecution in Canada" (Pet. 16, see also, Pet. 17). Petitioner was not, however, entitled to such immunity.

Murphy involved only the question of whether witnesses called before a state investigatory body could properly assert their right to silence after having been given immunity from state prosecution, on the ground that their answers would tend to incriminate

them under federal law. *Murphy* determined "the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him" (378 U.S. at 79). *Murphy* thus did not hold that an immunity statute, to be effective, must bar *prosecution* by the federal government of a witness who testified in a state proceeding; much less did it suggest that this Court was attempting to limit the prosecutorial authority of a foreign state—a limitation which, of course, this Court has no power to effectuate. It held only that, if the statute was to be effective, the compelled testimony and its fruits must be kept from use in any federal or state prosecution which did occur.

Assuming that *Murphy* does stand for the proposition that a witness, such as petitioner, is constitutionally entitled to rest on his Fifth Amendment privilege unless the grant of immunity prohibits the government from turning over his testimony or any fruits thereof to foreign authorities,[5] there was no violation of that principle in

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[5] The *Murphy* decision does not necessarily compel such a broad reading. While it is true that this Court's opinion, after an analysis of the English precedents, concluded that the "separate sovereignty" doctrine of self-incrimination was historically unsound (see 378 U.S. at 58-63), its conclusion was reached within the context of our federal system. And, as Mr. Justice Harlan pointed out in his concurring opinion, the ruling "that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any

this case. There is no suggestion here that the danger of prosecution under foreign laws is "real and appreciable"—a factor which the Court in *Murphy* deemed significant in the English cases it cited for the proposition that an individual may properly assert the privilege because of the threat of foreign prosecution (See 378 U.S. at 67-68, at 61 n.7). Cf. *Marchetti* v. *United States*, 390 U.S. 39, 48; *Minor* v. *United States*, Nos. 189 and 271, O. T. 1969, decided December 8, 1969. Petitioner has never indicated under what laws of Canada he fears prosecution or what factors his fears are based on—whether, in short, the dangers of incrimination are " 'real and appreciable' and not merely 'imaginary and unsubstantial' * * *," *Marchetti*, *supra*, 390 U.S. at 48; nor is there any indication that petitioner will soon come within the jurisdiction of Canada, another factor stressed in *Murphy* (378 U.S. at 67). He is presently serving an eighteen month sentence on another federal charge, and there is no suggestion that Canada is seeking his extradition.

Furthermore, as we read the record made on this issue before the district court (see *supra*, pp. 5-7), the court was of the view that the immunity extended to petitioner included the protection that any answers

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manner by federal officials in connection with a criminal prosecution against him" (see 378 U.S. at 79) did not have to be bottomed on constitutional grounds, but could have been enforced through the supervisory power of this Court over federal prosecutions (see 378 U.S. at 80, 81-82, 91-92). Be that as it may, there is no reason to reach the question as to the precise impact of *Murphy* in this case for, as we point out in the following text, even read broadly *Murphy* does not aid petitioner's case here.

he might give could not be used by the federal authorities in any affirmative way—that is, that they could neither use them themselves, nor turn them over to any government, whether state or foreign. Since grand jury testimony may be disclosed only if the district court finds a particularized need, Fed. R. Crim. P. 6(e); *Dennis* v. *United States*, 384 U.S. 855, 869-870), any danger petitioner might face that his testimony would be turned over to Canada is marginal. And since extradition proceedings are in the nature of criminal proceedings, at which "the evidence of criminality may be heard and considered," 18 U.S.C. 3184, with a view to determining whether there is competent legal evidence to justify apprehension and commitment for trial in the foreign country, *Collins* v. *Loisel*, 259 U.S. 309, it is apparent that the immunity statute bars consideration either of the grand jury testimony or of any evidence secured as a result of that testimony in determining whether to grant any extradition request that might be made.

2. As to the other claims raised in the petition—(1) that the indictment was insufficient; (2) that petitioner's plea of guilty was unknowing and involuntary and (3) that his waiver of counsel was not intelligently made—we rely on the comprehensive opinion of the court of appeals, which shows the insubstantiality of these contentions (Pet. App. B 9a-17a).[6]

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[6] For example, that court pointed out that petitioner was advised at least ten times of his right to counsel; was offered a delay in the proceedings so that he could consult with an attorney; and was further advised that, if he chose, counsel

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
ROGER A. PAULEY,
Attorneys.

JANUARY 1970.

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would be appointed to represent him. In each instance he refused these offers. And although petitioner now makes much of the fact that when the plea of guilty was originally entered by him, he said "I plead guilty, but not for not answering questions to the Grand Jury as you have ordered me to" (A. 22), the court of appeals pointed out that this was not the end of the matter. The district court adjourned the proceedings in order to obtain a presentence report, and give petitioner "a right to change [his] mind and purge [himself] of contempt" (A. 27). Two days later when asked by the court if he wished to withdraw his plea, petitioner stated: "I pleaded guilty to not obeying your order. I still stand on it (A. 30; see Pet. App. B 14a-15a).

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 852

HYMAN STERNMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

October Term, 1969

No. 852

HYMAN STERNMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY MEMORANDUM

This reply memorandum is limited to the following points made in the opposing brief of the United States:*

1. Concerning the Trial Court's Failure to Offer Petitioner an Opportunity to Explain the Basis of His Defense of Self-Incrimination, a Procedure Now Suggested in the Government's Brief

The crux of the Government's argument (Gov't brief p. 9) is that petitioner was required to present an explana-

* We believe that all other arguments in the opposing brief are sufficiently discussed in the petition for certiorari.

tion in order to "suggest" that his fear "of prosecution under foreign laws is 'real and appreciable'," before he could invoke the defense of the insufficiency of the grant of immunity to insulate him under Canadian laws.** Assuming, *arguendo,* the validity of the Government's contention, it further demonstrates that the trial court committed error when it permitted petitioner to enter his plea without the assistance of counsel.

Apparently, the Government's contention, imposing on petitioner a burden of going forward, envisages some sort of hearing at which petitioner could offer an explanation "suggesting" the propriety of a defense based on self-incrimination under foreign laws. Although petitioner, in layman's language, attempted to articulate the defense that the immunity granted him could not save him from prosecution in Canada (A. 7), the trial court never ordered any hearing to determine the validity of this defense. The trial court's acceptance of a guilty plea from petitioner without ordering such hearing was in conflict with *Von Moltke* v. *Gillies,* 332 U.S. 708, 723-24 (1948). This Court there stated that a plea of guilty without the assistance of counsel may be entered only after the trial judge has made "a penetrating and comprehensive examination of all the circumstances" and has determined that the defendant has full knowledge of all "possible defenses to the charges." This duty imposed on the trial court is even

** The initial issue whether the Fifth Amendment protects against compelling testimony incriminating under foreign laws—fully discussed in the petition—is also raised in the petition for certiorari filed on September 20, 1969 in *Parker* v. *United States,* No. 992.

more serious and weighty here, since the possible defense which the trial court was required to scrutinize involved a claim of self-incrimination. Under *Hoffman* v. *United States,* 341 U.S. 479, 486-88 (1951), a witness is not required to prove his right to claim his self-incrimination privilege; rather the duty rests on the court to sustain the privilege unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers *cannot possibly* have such tendency to incriminate." *Id.* at 488 (emphasis in original).

The trial court's error in rejecting petitioner's defense of self-incrimination without scrutinizing all relevant circumstances, as required by *Von Moltke* and *Hoffman,* was clearly prejudicial. Contrary to the Government's unsupported assertion (Gov't brief p. 9), the record before this Court and the record below indicate that, if the district court had made the required inquiry, the substantiality of petitioner's fear of prosecution under the laws of Canada would have been apparent. Thus, for example, (a) petitioner resided in Canada from 1960 through 1966, when he returned to the United States; (b) in December 1962, petitioner renounced his United States citizenship and thereafter applied for Canadian citizenship (which was later rejected); (c) petitioner's son was born in Canada on January 2, 1962; (d) pursuant to 8 U.S.C. §1253, petitioner, an alien, if deported, would be deported to Canada, "the country from which [he] * * * last entered the United States" (absent acceptance by another country chosen by petitioner); and

(e) the questions which petitioner refused to answer expressly concerned the period he lived in Canada.*

We do not suggest that this Court at this time should determine whether petitioner's fear of prosecution under the laws of Canada was real and appreciable. Rather, this determination should have been made after a searching inquiry into all the surrounding facts and circumstances by the district court prior to its acceptance of any guilty plea without counsel. Since no such inquiry was even attempted, petitioner's conviction should be reversed.

2. Concerning (a) Petitioner's Misconception, Based on the Trial Court's Advice, that No Procedure Was Available to Validate Petitioner's Exercise of His Privilege Against Self-Incrimination Under Canadian Laws; and (b) the Use of Petitioner's Testimony in an Extradition Proceeding and by Canadian Officials

The Government's contention, that petitioner was required to explain his self-incrimination claim, exposes another ground for reversal. When petitioner invoked

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* The facts in (a), (b) and (c) above are admitted in the "Government's Response to Defendant's Motion for Allowance of Bail" filed in the Court of Appeals, a copy of which we are herewith filing.

The Government erroneously represents (Gov't brief p. 9), without citation, that petitioner "is presently serving an eighteen month sentence on another federal charge * * *." Even if correct, this circumstance would be irrelevant to petitioner's fear of prosecution. But, the fact is to the contrary: The record makes clear that petition *was* serving an eighteen month sentence on February 14, 1968 when he was brought before the grand jury in Ohio (A. 39). Thus, since it is now more than eighteen months since February 14, 1968, petitioner could not still be serving that sentence. Indeed, petitioner was actually released in November 1968 from incarceration on that unrelated sentence.

the Fifth Amendment as to questions concerning the period he lived in Canada, the district court did not advise petitioner that he might properly decline to answer such questions if he could explain the circumstances which made him apprehensive. Rather, the court responded that petitioner could not "stand on the Fifth Amendment with respect to these matters because you are granted immunity" (A. 7-A. 8). Thus, both after he refused to answer the questions and when he entered his plea, petitioner acted under the misconception that no procedure existed whereby he could validate his refusal to answer questions. To paraphrase this Court's opinion in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 80 (1964), "[f]airness dictates that petitioner should now be afforded an opportunity, in light of" the Government's contention, to present an explanation validating his claim of self-incrimination. As in *Murphy,* the judgment should be vacated and the cause remanded to the district court to grant petitioner that opportunity.

Similar reasoning applies to the Government's contention (Gov't brief p. 10) as to the effect of Rule 6(e), F. R. Crim. P., on the use that may be made of petitioner's grand jury testimony by Canadian officials or in an extradition proceeding. While suggesting that Rule 6(e) precludes such use of grand jury testimony, the Government cites no authority so holding. Indeed, the Government implicitly concedes it to be a question of first impression since it refers to the danger to petitioner as "marginal,"

not non-existent.* At the time petitioner declined to answer questions, he had no basis to conclude that his testimony could not be used against him in Canada or in an extradition proceeding. Again, to paraphrase *Murphy*, if this Court now holds that Rule 6(e) protects petitioner from any such use of his grand jury testimony, "[f]airness dictates that petitioner should now be afforded an opportunity, in light of this development, to answer the questions," by vacating the judgment and remanding to the district court for that purpose.

3. Concerning the Government's Reference to the Transcript of Petitioner's Grand Jury Appearances—a Transcript Never Previously Made Available to Petitioner or His Counsel

In its opposing brief (p. 4), the Government refers to, and advises it is filing with this Court, a copy of the transcript of petitioner's appearances before the grand jury. As made clear in the record before this Court (A.51), neither the trial court nor petitioner had a copy of the transcript of the grand jury proceedings. Indeed, petitioner's counsel first examined a copy of that tran-

* Even such a "marginal" danger of incrimination is sufficient to require that the exercise of the privilege against self-incrimination be sustained. The exercise of the privilege can be rejected only if the testimony *"cannot possibly"* incriminate. *Hoffman* v. *United States*, 341 U.S. 479, 488 (1951) (emphasis in original). In addition, the rule that evidence, incompetent in the United States, is admissible in an extradition proceeding if it is admissible in the seeking country, casts some doubt on the Government's observation. Thus, even a constitutional protection, the right "to be confronted with the witnesses against him" (U.S. CONST. AMEND. VI), does not prevent admissibility, in an extradition hearing, of hearsay affidavits and depositions admissible in the seeking country. *E.g.*, *Bingham* v. *Bradley*, 241 U.S. 511, 517 (1916); *Argento* v. *Horn*, 241 F.2d 258, 263 (6th Cir.), *cert. denied*, 355 U.S. 818 (1957).

script following its filing with this Court by the Solicitor General.* More significantly, the Government's reference to and filing of the grand jury transcript further establishes the failure of the trial court to perform its obligation under *Von Moltke* (and *Hoffman*), *i.e.*, to make a "penetrating and comprehensive examination of all the circumstances" before permitting a defendant without counsel to enter a plea of not guilty. Shortly before he entered his plea in the district court, petitioner asked the court if he could "get a copy of what went on in the jury room" (A. 18). Despite this specific inquiry, the court neither reviewed the grand jury transcript nor advised petitioner how he could obtain a copy. Rather, the district court's response was that petitioner's inquiry raised "a rather complicated legal problem" as to which his plea was irrelevant (A. 18-A. 19).

By filing here a copy of the grand jury transcript, the Government indicates that the transcript is relevant to the issues before this Court. A fortiori, that same transcript was relevant to the issues before the trial court. Hence the trial court should not have accepted petitioner's plea of guilty without counsel unless and until it had made "a penetrating and comprehensive examination of" that transcript.

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* The Solicitor General made a copy available to petitioner's counsel after being advised that petitioner and his counsel had never seen the transcript of petitioner's grand jury appearances.

Conclusion

The Government's contentions, as discussed above, demonstrate the need for this Court to review the action below; indeed, petitioner suggests that, in view of the Government's position, summary reversal is now appropriate.

Respectfully submitted,

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STEVEN B. ROSENFELD
Of Counsel

January 14, 1970

SUPREME COURT, U. S.

APR 10 1970

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 852.

HYMAN STERNMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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In the Supreme Court of the United States

OCTOBER TERM, 1969.

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HYMAN STERNMAN,

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vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

Petitioner presents its petition for a rehearing of this Court's order dated February 24, 1970, denying the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, and, in support thereof, respectfully shows:

JURISDICTION.

The judgment of the Court of Appeals was entered on June 24, 1969. A timely petition for rehearing was denied on October 17, 1969. A timely petition for writ of certiorari was denied by this Court on February 24, 1970, and a timely motion for extension of time to April 11, 1970, in order to file a petition for rehearing was granted on March 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Whether defendant can be indicted and sentenced for 3 years for contempt under 18 U.S.C., Section 401, a felony, where his only contempt has been a violation of 47 U.S.C., Section 409(l), for which violation specific penalties of a Five Thousand Dollar ($5,000.00) fine or 1 year imprisonment or both are provided under 47 U.S.C., Section 409(m), a misdemeanor.

2. Whether petitioner has been afforded equal protection under the law where he violated 47 U.S.C., Section 409(l) and was sentenced to three years for criminal contempt under 18 U.S.C., Section 401, in the Northern District of Ohio and a person also violating 47 U.S.C., Section 409(l) was only sentenced to prison during the term of the Grand Jury for civil contempt in the Central District of California.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Section 1 of the Fourteenth Amendment to the Constitution of the United States, Section 401 of Title 18 of the United States Code, Section 409 (l) and (m) of Title 47 of the United States Code, which are involved, are set out verbatim in Appendix A, *infra,* page 9.

STATEMENT.

On February 14, 1968, petitioner, Hyman Sternman, was brought before a Federal Grand Jury sitting in the Northern District of Ohio, Western Division to answer questions pursuant to an investigation of the use of telephone communications in gambling activities in violation of the Federal Communications Act, 47 U.S.C. (A4).* Following petitioner's refusal to answer questions on the grounds of possible self-incrimination, he was brought before the District Court, where he was ordered, pursuant to 47 U.S.C., Section 409 (l), granting him immunity (A5), to answer those questions. Petitioner persisted in his refusal and on February 15, 1968, the Grand Jury, despite the obvious enforcement provisions provided in 47 U.S.C., 409 (m), handed down an indictment charging the petitioner with *criminal contempt* for having disobeyed a "lawful order to answer questions to be asked in the conduct of the Grand Jury proceedings" in violation of 18 U.S.C., Section 401. Thereafter, on February 19, 1968, petitioner was brought before the District Court to enter a plea to this Indictment for *criminal contempt. Subsequent to his plea of guilty,* and despite the supposedly criminal nature of the proceedings as indicated by the indictment, petitioner was repeatedly offered opportunities to "purge" himself of the contempt charges brought against him. For example, Mr. Mattimoe, the United States Attorney, stated at one point that, "I have advised Mr. Sternman in the Grand Jury that if he does give answers to those questions, he could possibly purge himself of this charge, and I would like to advise him in open court that if he desires

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* Citations containing the prefix "A" refer to page numbers of the Appendix filed by petitioner in the United States Court of Appeals for the Sixth Circuit, which has been filed as part of the certified record in this court.

to answer questions, the Court will allow us to call the Grand Jury and hold up these proceedings." (A25) To this, the court replied, "I certainly will" (A26). The court's apparent failure to distinguish between civil and criminal contempt is further demonstrated later in the proceedings when he advised petitioner that, "In spite of the Indictment and your plea, I will hold out to you, at least until I get the presentence report, a right to change your mind and purge yourself of contempt" (A27). Finally, at the conclusion of this hearing the court stated, "But I say to you again, the gate is still open" (A28).

Thereafter, on February 21, 1968, the petitioner was brought before the District Court and sentenced to a prison term of three years duration for violation of 18 U.S.C., Section 401 (A30).

The Grand Jury, before which the petitioner declined to answer questions and for which declination petitioner was indicted, was excused on December 19, 1968.

REASONS FOR GRANTING WRIT.

As hereinafter shown, several bases for granting certiorari are found in the various issues raised by this petition for rehearing which were not previously raised in the petition for writ of certiorari: conflict with applicable decisions of this Court and important questions not yet determined by this Court.

1. The decision below is in conflict with this Court's opinion in *Shillitani v. United States of America*, 384 U.S. 364 (1966).

Petitioner was brought before the Grand Jury to testify concerning the widespread use of telephone communications in gambling activities in violation of the Federal Communications Act (A5). Pursuant to 47 U.S.C., Section 409 (l), he was granted immunity against self-incrimination (A5), but nonetheless persisted in refusing to answer questions put to him. 47 U.S.C., Section 409 (m) sets forth specific penalties for violation of Section 409 (l), not to exceed Five Thousand Dollars ($5,000.00) in fines, or more than one year imprisonment or both, and characterizes such violation as a misdemeanor. Petitioner strongly urges that the criminal contempt indictment and three year prison sentence imposed by the District Court are excessive and in direct conflict with this Court's admonition in *Shillitani*, where the opinion states at page 371:

> "* * * This limitation accords with the doctrine that a court must exercise '(t)he least possible power adequate to the end proposed.'".

This admonition is especially pertinent to the instant case where the penalties for contemptuous conduct in violation of 47 U.S.C., Section (l) are mandatorily prescribed in 47 U.S.C., Section 409 (m). Accordingly, where sanc-

tions for contempt have been specifically provided by Congress, and the District Court has imposed a penalty far in excess of that provided for by the applicable law, the question of whether the rule enunciated in *Shillitani* has been violated is an important question to be reviewed by this Court.

2. In *Shillitani,* this Court held that imprisonment for contempt must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify before the Grand Jury. The test applied by this Court in *Shillitani,* to determine whether the punishment is intended to operate coercively rather than punitively is: "what does the court primarily seek to accomplish by imposing sentence?" In the instant case, the District Court's clear purpose, as indicated by the record, was to coerce the petitioner into answering questions before the Grand Jury, notwithstanding the criminal contempt indictment. Petitioner was repeatedly offered the opportunity to purge himself of contempt, *even after* he had pled guilty to the indictment and had been sentenced to a three year prison term for his refusals. Thus, the District Court employed criminal contempt proceedings in an attempt to achieve the stated purpose of coercing petitioner into complying with its order, yet, at the same time, the Order itself, did not contain a purge clause. This procedure is in direct conflict with decisions of the Court of Appeals for the Fifth Circuit. In *Southern Railway Company v. Lanham,* 403 F. (2d) 119 (5th Cir., 1968) the court stated at page 124:

> * * * Although the entitling of the order or recitals contained in the order may be considered, * * * the appellate court on review must determine whether the contempt is civil or criminal in the light of the nature and purpose of the punishment. *Shillitani v. United States,* 1966, 384 U.S. 364, 369, 86 S.

Ct., 1531, 1535, 16 L. Ed. (2d) 622; see *Stewart v. Dunn*, 5th Cir. 1966, 363 F. (2d) 591, 600, n. 5. The substance of the contempt rather than its form is our guide. * * *

See also: *Scott v. Hunt Oil Company*, 398 F. (2d), 810 (5th Cir., 1968).

The case of *In re: Ruby Lazarus*, 276 F. Supp. 434 (1967), involved identical proceedings held before the United States District Court, Central District of California. There too the District Court was faced with a recalcitrant witness who, after being granted immunity under 47 U.S.C., Section 409 (l), refused to testify before the Grand Jury regarding the very same gambling activities investigation about which petitioner refused to testify. The District Court, in accordance with the doctrine propounded in *Shillitani*, imposed the sanction of imprisonment conditioned upon the defendant's compliance with the order to testify. At page 448 the Court said:

> The only problem we now have is the choice of sanctions and that problem was solved for us by the Supreme Court two years ago. The teaching of *Shillitani* is that; following the doctrine of exercising "(t)he least possible power adequate to the end proposed," the court should imprison the witness for a period not exceeding the duration of the term of the Grand Jury but until his compliance with the orders of the Court by giving answers to the Grand Jury questions.
>
> We strongly admonish the witness Lazarus that the conditional imprisonment imposed upon him is for the obvious purpose of compelling him to obey the order to testify before the Grand Jury. As a result, "he carries the key of his prison in his own pocket." If he had chosen to obey the order he would not have faced jail. And the sentence is not by way of punishment but solely to secure answers to the Grand Jury questions.

In the case of *National Union of Marine Cooks and Stewards v. Arnold,* 348 U.S. 37 (1954) this Court held that where persons comparably situated have been treated differently under the law, as in the case of petitioner and Ruby Lazarus, the question of equal protection under the law becomes an issue.

Petitioner, therefore, contends that in light of the cases cited, the prison sentence of three years was excessive and discriminatory.

In view of the apparent confusion extant in the application of criminal and civil contempt proceedings for conduct before Grand Juries, the question of the extent of sanctions which should be imposed for defiance of orders to answer questions is an important question which should be decided by this Court in accordance with the principles enunciated in *Shillitani.*

CONCLUSION.

For the foregoing reasons, this petition for rehearing of the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD I. STILLMAN,
Attorney for Petitioner.

Of Counsel:

CREIGHTON E. MILLER.

Certificate of Counsel.

The undersigned hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

EDWARD I. STILLMAN,
Attorney for Petitioner.

APPENDIX A.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

1. United States Constitution, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 18 U.S.C. § 401:

§ 401. Power of court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

3. 47 U.S.C. § 409 (l) and (m).

(l) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the

Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(m) Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, schedules of charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpena or lawful requirement of the Commission, shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. June 19, 1934, c. 652, Title IV, § 409, 48 Stat. 1096; July 16, 1952, c. 879, § 16, 66 Stat. 721; Aug. 31, 1961, Pub. L. 87—192, § 4, 75 Stat. 422.